90-1584

No. 90-___

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

SANDRA R. KEMP,

Petitioner,

vs.

STATE BOARD OF AGRICULTURE, and COLORADO STATE UNIVERSITY; ROSELYN KELLER, in her capacity as a Conciliation Officer at Colorado State University; DANA HIATT, in her capacity as Director of Office of Equal Opportunity at Colorado State University; and PHILLIP AUSTIN, in his capacity as President of Colorado State University,

Respondents.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

*A. Bruce Jones
Ian S. Karpel
Stephen G. Masciocchi
Holland & Hart
Post Office Box 8749
Denver, CO 80201
(303) 295-8000

Counsel for Petitioner

In Cooperation With The American Civil Liberties Union Foundation of Colorado

April 12, 1991

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, in applying the balancing test of *Connick v. Myers*, 461 U.S. 138 (1983), and after finding that a government employee's letter to a United States Senator was speech on a matter of public concern, a court should: (a) consider the employee's motivation in writing the letter; and (b) as a justification for punishing the employee for the letter in question, require nothing more from the state than a showing that the employee violated administrative rules.

2. Whether the *Connick* balancing approach applies to a right to petition claim based on a government employee's letter to her United States Senator.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Factual Background 4

B. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 8

A. *A conflict exists in the state and lower federal courts on the role of motivation in* Connick*-type cases* 9

B. *The court improperly emphasized the government's interest in its administrative rules, without considering whether the employee's speech negatively impacted a legitimate purpose underlying the rules* 14

C. *Mrs. Kemp's petition claim presents an important and largely unexplored issue of utmost constitutional significance warranting this Court's review* 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Adderly v. Florida, 385 U.S. 39 (1966) 16

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988) 10

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 16

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 10

Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987) 10

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Conway v. Smith, 853 F.2d 789 (10th Cir. 1988) 10

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 16

Garrison v. Louisiana, 379 U.S. 64 (1964) 16

Johnson v. Lincoln University, 776 F.2d 443 (3d Cir. 1985) 10, 11, 12

Kemp v. State Bd. of Agriculture, 803 P.2d 498 (Colo. 1990) 2

Kurtz v. Vickrey, 855 F.2d 723 (11th Cir. 1988) 10

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 10, 11

McDonald v. Smith, 472 U.S. 479 (1985) 9, 16

Pickering v. Board of Education, 391 U.S. 563 (1968) 9, 14

Rankin v. McPherson, 438 U.S. 378 (1987) 7, 9

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 15

TABLE OF AUTHORITIES – Continued

Page

Rode v. Dellacriprete, 845 F.2d 1195 (3d Cir. 1988).... 10, 11

Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988) 11

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I..... 2

U.S. CONST. amend. XIV..... 2

STATUTES

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983.....3, 6

Colo. Rev. Stat. §§ 23-31-108 to 112 3

No. 90-___

In The

Supreme Court of the United States

October Term, 1990

SANDRA R. KEMP,

Petitioner,

vs.

STATE BOARD OF AGRICULTURE, and COLORADO STATE UNIVERSITY; ROSELYN KELLER, in her capacity as a Conciliation Officer at Colorado State University; DANA HIATT, in her capacity as Director of Office of Equal Opportunity at Colorado State University; and PHILLIP AUSTIN, in his capacity as President of Colorado State University,

Respondents.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at *Kemp v. State Bd. of Agriculture*, 803 P.2d 498 (Colo. 1990) and is included in the Appendix at App. 3-27. The Order of the supreme court denying rehearing is in the Appendix at App. 1. The opinions of the Colorado Court of Appeals and the District Court are in the Appendix at App. 29-36 and App. 37-43, respectively. In addition, the administrative decision letter by Respondent Keller is in the Appendix at App. 44-45 and the letter by Respondent Austin upholding that decision is in the Appendix at App. 46-47.

JURISDICTION

The Opinion and Judgment of the Colorado Supreme Court was entered on December 10, 1990. A timely Petition for Rehearing was denied on January 14, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the United States Constitution states in part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right . . . to petition the Government for a redress of grievances."

Amendment 14 of the United States Constitution provides in part: "No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 states in part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner Sandra R. Kemp brought this case against Respondents Colorado State Board of Agriculture and Colorado State University,[1] Roselyn Keller, Dana Hiatt and Phillip Austin (collectively "CSU") alleging that her first amendment rights to free speech and to petition the government for redress had been violated when CSU voided her employment grievance proceeding because she had written a letter to United States Senator William Armstrong. By voiding the proceeding, CSU denied Mrs. Kemp a favorable opinion by an internal grievance panel,

[1] By statute, the Colorado State Board of Agriculture is the governing body for Colorado State University. Colo. Rev. Stat. §§ 23-31-108 to 112.

which held that she had been the victim of institutional racism and sexism.

A. Factual Background

From August 1982 to August 1985, Mrs. Kemp was employed as an extension agent with CSU in southeast Colorado, a predominantly white, rural area. In November 1984, she filed an internal grievance with CSU alleging she was being discriminated against because she was black and a woman. App. at 4. Pursuant to CSU's grievance procedure, a closed hearing was conducted before a panel to evaluate the validity of the claims. After the hearing was completed, but before a decision had been rendered by the panel, Mrs. Kemp and her husband wrote a letter to United States Senator William Armstrong.[2] App. at 5. The letter complained of procedures designed to prejudice the case against Mrs. Kemp, stated that it had been suggested Mrs. Kemp should "quietly resign" because nothing would be done to the perpetrators of the discrimination, and requested the Senator's assistance. The letter also suggested that an investigation by the United States Attorney's Office into possible civil rights violations at CSU might be warranted. The letter is contained in the Appendix at App. 48-49. In her deposition, Mrs. Kemp explained that, since she believed she had been treated unfairly in the grievance proceeding, others might have as well, which would warrant a civil

---

[2] The letter is actually signed by Mr. Kemp. However, it was undisputed below that the letter constituted Mrs. Kemp's own speech, as well. Indeed, CSU's actions against Mrs. Kemp were based on this construction of the letter. App. at 5-6.

rights investigation. In this regard, the letter enclosed a complaint by another employee against one of Mrs. Kemp's supervisors. App. at 20.

When Senator Armstrong's office made an inquiry about Mrs. Kemp's complaints, Respondent Hiatt, the head of CSU's EEO office, informed the Senator's administrative assistant that the letter was in violation of CSU's grievance policy. Even though the hearing had been completed, Ms. Hiatt believed the letter violated the "closed" nature of that proceeding. Ms. Hiatt also indicated that, in seeking the Senator's assistance, Mrs. Kemp had violated a prohibition in CSU's grievance policy against simultaneously proceeding with an internal complaint while also seeking relief from an outside "agency or court." Ms. Hiatt equated contacting Senator Armstrong's office with a violation of this prohibition. Respondent Keller, the EEO officer handling Mrs. Kemp's complaint, then wrote Mrs. Kemp to inform her that her proceeding had been voided. App. at 44-45. Mrs. Kemp appealed the decision of Respondents Hiatt and Keller to Phillip Austin, who was then president of CSU. President Austin upheld the decision. App. at 46-47.

The decision of the hearing panel, finding that institutional racism and sexism existed at CSU and recommending that Mrs. Kemp be transferred from her job in southeast Colorado, was never issued.[3] App. at 20. Thus,

---

[3] Mrs. Kemp obtained a copy of the decision, executed by the panel members, through discovery in this case. *See* App. at 20 n.1.

because of her letter, Mrs. Kemp was denied the important employment right of an internal grievance proceeding and decision. Rather than the relatively quick relief that would have been forthcoming through the panel's decision, Mrs. Kemp was forced to begin anew with the federal EEOC in Denver.

Mrs. Kemp suffered intense psychological distress because of CSU's actions, which she viewed as violative of her constitutional rights. She was forced to take a medical leave of absence from CSU and was ultimately terminated because she could not return to work.

B. Proceedings Below

Mrs. Kemp filed her action in state district court in Larimer County, Colorado under 42 U.S.C. § 1983 and directly under the Colorado Constitution. The federal questions sought to be reviewed were raised by Mrs. Kemp from the inception of her case. *See, e.g.*, App. at 39 & 41. After limited discovery, the parties filed cross-motions for summary judgment, with Mrs. Kemp emphasizing that her letter was speech on a matter of public concern, and therefore protected under the first amendment. The district court rejected this argument and also ruled that, in any event, CSU's interest outweighed Mrs. Kemp's first amendment rights. App. at 39-41. The only interest advanced by CSU was the integrity of its grievance procedure. CSU has never explained how Mrs. Kemp's letter impacted the effectiveness of its grievance procedure. Indeed, it is not at all clear from the language of the grievance policy that Mrs. Kemp's actions were a violation. App. at 21-22, Mullarkey, J., dissenting. The

district court also held that Mrs. Kemp's letter was not a proper petition for redress, but instead was seeking improper interference by the Senator. App. at 40.

Mrs. Kemp appealed to the Colorado Court of Appeals. That court affirmed the district court's judgment on the merits, finding that Mrs. Kemp's letter was not speech on a matter of public concern. App. at 29-36. The appeals court also agreed with the district court's interpretation of the right to petition claim. App. at 33. Mrs. Kemp then petitioned the Colorado Supreme Court for a writ of certiorari, which was granted. After briefing and oral argument, the supreme court affirmed the court of appeals in a 4 to 3 decision. App. at 7-27.

The Colorado Supreme Court held that Mrs. Kemp's letter to Senator Armstrong was speech on a matter of public concern as defined by this Court's decisions in cases such as *Connick v. Myers*, 461 U.S. 138 (1983) and *Rankin v. McPherson*, 438 U.S. 378 (1987). App. at 13-15. The court also held that CSU had deprived Mrs. Kemp of an actionable employment right. *Id.* at 10. However, in then applying the balancing test required by *Connick*, the Supreme Court concluded that CSU's interest outweighed the interest of Mrs. Kemp. *Id.* at 16-17. The court also concluded that no different analysis was necessary with respect to Mrs. Kemp's right to petition claim. *Id.* at 17. Therefore, it upheld the dismissal of Mrs. Kemp's federal constitutional claims.

The Colorado Supreme Court's rulings raise fundamental first amendment issues about the proper approach in applying the *Connick* balancing test. In particular, the court gave undue weight to Mrs. Kemp's motivation in

writing her Senator, and contradicted its earlier findings concerning the important issues touched on by the letter. *Compare* App. at 13-15 *with* App. at 16-17. Having improperly and inconsistently denigrated the content of Mrs. Kemp's speech, the court then found that Mrs. Kemp's first amendment interest was outweighed by the interest of CSU in protecting the integrity of its grievance procedure. App. at 17. The court made no finding that CSU's actions advanced its ability to provide governmental services to the public, which is the relevant state interest as defined by *Connick*. Finally, the court performed no separate analysis of Mrs. Kemp's right to petition claim. Even though the court acknowledged that the form of Mrs. Kemp's speech – a letter to a United States Senator seeking assistance – was important in analyzing whether the speech was on a matter of public concern, it concluded that the *Connick* approach was applicable to her petition claim and the same balancing results were required. App. at 17-18.

REASONS FOR GRANTING THE PETITION

The Colorado Supreme Court's interpretation of the balancing test outlined in *Connick* results in little or no protection to the free speech rights of public employees, except in those limited instances in which an employee speaks only as a disinterested citizen. If the content of an employee's speech touches on matters of public concern, but her motivation is not a pure desire to inform the public, she has no claim. The decision conflicts with the holdings of this Court in *Connick* and subsequent cases, and highlights a conflict among the circuit courts on the

proper analysis of an employee's motivation in engaging in the speech at issue.

This case is also worthy of this Court's review because of the Colorado court's analysis of CSU's interest as part of the balancing process. In effect, the supreme court held that mere administrative convenience is sufficient to outweigh an employee's free speech rights even if the speech was shown to have had negligible impact on the government agency's ability to serve the public.

Finally, the case should be reviewed because of the Colorado court's analysis of Mrs. Kemp's petition claim. A letter to one's elected representative is a classic exercise of the right to petition. Relying on this court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985), the Colorado court determined that the right to petition claim was entitled to no more protection (nor to a different analysis) than was the free speech claim. The *Connick* balancing analysis was controlling.

A. A conflict exists in the state and lower federal courts on the role of motivation in *Connick*-type cases.

In a line of cases beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968), and continuing through *Connick* and *Rankin*, this Court has elaborated the proper method for addressing the free speech claims of government employees. Both state and federal courts continue to address numerous such cases every year. A Westlaw search by Petitioner has revealed that, from 1990 to the present, 31 federal circuit cases cited the *Connick* analysis.

There is a conflict among the various lower courts with respect to the role of an employee's motivation in analyzing these types of claims.[4] The Seventh Circuit has held that an employee's motivation is a critical part of analyzing whether speech is on a matter of public concern, i.e., in resolving the first prong of the *Connick* analysis. *See, e.g., Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) ("*Connick* test requires us to look at the *point* of the speech in question"); *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985). *But see Breuer v. Hart*, 909 F.2d 1035, 1039 & n.5 (7th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1263 (7th Cir. 1988) (attempting, with limited success, to reconcile prior 7th Circuit decisions with 3rd Circuit interpretations of *Connick*). The Third Circuit has held that emphasizing motivation is inappropriate in analyzing whether speech is on a matter of public concern. Content is of greater importance to the first prong of *Connick*. The Third Circuit emphasizes that, if only a limited portion of the speech is of public concern, this fact should be considered in the subsequent balancing test. *Rode v. Dellacriprete*, 845 F.2d 1195, 1201 (3d Cir. 1988); *Johnson v. Lincoln University*, 776 F.2d 443, 451 (3d Cir. 1985). This difference in approach is certainly significant; in the Seventh Circuit cases, the plaintiff invariably

---

[4] Although the Colorado Supreme Court focused upon the split between the Third and Seventh Circuits, the conflict among the circuits is far-reaching. *Compare, e.g., Conway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988) (motivation of speaker is focus of public concern inquiry) with *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988) (content of speech is "notably overlooked" when courts focus on motivation of public employee).

lost when motivation was emphasized, while in the Third Circuit, the plaintiff prevailed. *Compare, e.g., Johnson*, 776 F.2d at 453-55 *with Linhart*, 771 F.2d at 1009-11.

The Third Circuit has noted that emphasis on motivation conflicts with *Connick* and ignores the possibility that, even though motivated by self-interest, an employee may nevertheless engage in speech of great public concern. *Zamboni v. Stamler*, 847 F.2d 73, 78 (3d Cir. 1988) ("[I]t is unlikely that any employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment right"); *Rode*, 845 F.2d at 1201; *Johnson*, 776 F.2d at 451.

Here, the Colorado Supreme Court purported to follow the Third Circuit in not analyzing Mrs. Kemp's motivation during its analysis of whether her speech was on a matter of public concern. App. at 13-15. However, the confusion created by the circuit split impacted the decision in a different way. In the second prong of the analysis, the Colorado court reached the same conclusion as would have the Seventh Circuit by placing almost total emphasis on Mrs. Kemp's motivation as a way of determining that her free speech rights were of negligible worth and were outweighed by CSU's interest in the integrity of its grievance procedure. App. 16-17. In doing so, the opinion misinterprets and misapplies *Connick* and highlights the difficulty created by the circuit split on the relevance of motivation.

The Colorado Supreme Court acknowledged the conflict among the circuits and initially appeared to properly resolve the issue by finding that Mrs. Kemp's letter was

on a matter of public concern, even though it appeared to be motivated out of her own personal self-interest. App. at 13-15. The court noted that the context in which the speech arose was a claim of racial discrimination. The court stated that "the form of the speech – a letter to a United States senator, only lends credence to the argument that the speech touched on a matter of public concern," App. at 14, and that Mrs. Kemp's personal stake in the outcome did not "alchemize that claim into a purely private matter in which the public had no interest." *Id.* at 15. Certainly, the content of the letter, with its reference to the suggestion to Mrs. Kemp that she quietly resign because nothing would be done to those who had discriminated against her (App. at 48), is of utmost public concern.

Having reached a conclusion on the first prong of *Connick* that appeared to emphasize the correct factors, the court then reinserted the motivation issue into the balancing part of the *Connick* analysis. This case presents the Supreme Court with an opportunity to clarify the role of motivation in *Connick*-type claims because, inexplicably, the Colorado court contradicted its earlier conclusion and held "[t]hat Kemp's letter is composed of matters of only personal concern to her [which] weighs against her in the balancing." App. at 17, *citing Johnson*, 776 P.2d [sic] at 451. The same constitutional concerns counseling against excessive reliance on an employee's motivation in the first prong of the *Connick* test are applicable to the balancing process as well. Personal involvement will often cause an employee to speak out on an issue of public concern. An emphasis on motivation also effectively requires a court to make an in-depth qualitative

analysis of the public importance of an employee's speech. Thus, if the employee's speech arises from personal involvement in a dispute, the court will closely examine the "importance" of the speech. *Connick* appears to mandate, however, only a quantitative analysis of the speech in question, *i.e.*, *how much* of the speech was of public concern. In moving from classification of speech to an express evaluation of the importance of its content, judges would become the overseers of public debate.

For the Colorado court, Mrs. Kemp's intent was predominant in determining the importance of her speech.[5] In effect, the Colorado Supreme Court ruled that the state could punish speech on a matter of public concern because of the employee's self-interest in speaking out. The court repeatedly relied on language from *Connick* in which this Court stated that the plaintiff was "gather[ing] ammunition for another round of controversy with her superiors." This aspect of *Connick* was not part of the Court's balancing test. Instead, it was used in analyzing whether any aspect of the speech in question touched on a matter of public concern. The role of motivation in the free speech claims of public employees warrants this Court's review.

---

[5] This focus on intent raises procedural problems, particularly in a summary judgment context. While this Court has held that the *Connick* issues are, for the most part, ones of law, an emphasis on an employee's motivation thrusts a court into factual findings based on an only partially developed record.

B. The court improperly emphasized the government's interest in its administrative rules, without considering whether the employee's speech negatively impacted a legitimate purpose underlying the rules.

This Court should also review Mrs. Kemp's case because of the Colorado Supreme Court's holding on the sufficiency of the state interest warranting punishment of speech on issues of public concern. The Colorado Supreme Court properly recited the analytical framework for applying this Court's balancing test, including a reference to the burden placed on the government to justify its actions. App. at 15, 17. The Colorado court's application of the test, however, unduly relaxed the government's burden and demonstrates that an elaboration of *Connick* is needed.

In siding with CSU based on nothing more than the University's interest in maintaining the "integrity of its grievance procedure," the Colorado court essentially held that mere administrative convenience can and should outweigh the constitutional rights of state employees. Invariably in cases such as these, the employee will be viewed by the government as having acted improperly and, quite often, in violation of specific rules or guidelines effectively preventing speech on matters of public interest. This Court, both in *Connick* and *Pickering*, emphasized that it is the government's interest in efficient service to the public, and not mere internal efficiency, that must be considered in the balancing test. *Connick*, 461 U.S. at 150-51; *Pickering*, 391 U.S. at 568. The Colorado court's approach undermines the rationale of the *Pickering* line of cases – that a government employee

does not forfeit his constitutional rights by virtue of his employment – and directly conflicts with this Court's rulings in other first amendment settings. *See, e.g., Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988) (in rejecting state's argument that charitable solicitation regulation was most efficient method for preventing fraud, Court stated "simply and emphatically that the First Amendment does not permit the state to sacrifice speech for efficiency").

CSU has not described how a violation of the integrity of its grievance procedure might diminish its ability to provide efficient service to the public. Nor has it identified the underlying rationale for the aspects of its policy which Mrs. Kemp supposedly trammeled.[6] If the type of meager state interest advanced here is sufficient to outweigh the constitutional rights of public employees, then the *Pickering* line of cases provides little if any protection to those rights. This Court should review the case to elaborate on the types of interests that the state must advance to meet its burden under the balancing test envisioned by *Connick*.

---

[6] Indeed, it was essentially acknowledged by the Colorado Supreme Court that (a) the prohibitions of the policy were unclear, (b) the need to apply the alleged prohibitions to Mrs. Kemp was less clear still, and (c) the mandate of the policy, if a violation occurred, was nonexistent. App. at 5, 21-22.

C. Mrs. Kemp's petition claim presents an important and largely unexplored issue of utmost constitutional significance warranting this Court's review.

The form of Mrs. Kemp's speech in this case – a letter to a United States senator seeking assistance – should have been of some independent constitutional significance. A letter to one's elected representative is a classic form of petitioning for redress. *See McDonald*, 472 U.S. at 482 (writing the President of the United States regarding a nominee was within the general protection of the petition clause). *See also Adderly v. Florida*, 385 U.S. 39, 49-50 (1966) (Douglas J., dissenting) (petition right "has an ancient history and *is not limited to* writing a letter or sending a telegram to a congressman. . . . ") (emphasis added). Mrs. Kemp was punished for engaging in this most fundamental form of democratic activity.

This Court has never addressed whether the *Connick* analysis extends to such a claim by a public employee. In other contexts, the Court has clarified the relationship between the petition clause and other first amendment rights. *See, e.g., McDonald*, 472 U.S. at 485; *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). The Court has described the clause as part of the overall constitutional guarantee to freedom of expression. *McDonald*, 472 U.S. at 486 (Brennan, J., specially concurring); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). The Court developed or adopted tests that made sense in light of the circumstances presented in the cases before it. The Colorado Supreme Court did not take this approach; it applied *Connick* without any analysis. In

so doing, the Colorado court reduced the petition clause to a constitutional redundancy. Mrs. Kemp's case is also worthy of the Court's review for this reason alone.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

*A. Bruce Jones
Ian S. Karpel
Stephen G. Masciocchi
Holland & Hart
Post Office Box 8749
Denver, CO 80201

Counsel for Petitioner

In Cooperation With The
American Civil Liberties
Union Foundation of
Colorado

April 12, 1991

*Counsel of Record

SUPREME COURT, STATE OF COLORADO
CASE NO. 89SC696
CERTIORARI TO THE COLORADO COURT OF APPEALS, 88CA0317 & 88CA0899

ORDER OF COURT

SANDRA R. KEMP,

Petitioner,

vs.

STATE BOARD OF AGRICULTURE and COLORADO STATE UNIVERSITY; ROSELYN KELLER, in her capacity as Conciliation Officer at Colorado State University; DANA HIATT, in her capacity as Director of the Office of Equal Opportunity at Colorado State University; and PHILLIP AUSTIN, in his capacity as President of Colorado State University,

Respondents.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 14, 1991.
Chief Justice Rovira and Justice Vollack would grant.
Justice Mullarkey does not participate.

cc:

A. Bruce Jones
Ian S. Karpel
HOLLAND & HART
555 17th St.,
Suite 2900
P.O. Box 8749
Denver, CO 80201

Daniel R. Satriana, Jr.
Marlene T. Gresh
Sean R. Gallagher
HALL & EVANS
1200 17th St.,
Suite 1700
Denver, CO 80202

Tim Arnold
Deputy Atorney [sic] General

Lee Combs
Special Assistant Attorney General
State Board of Agriculture
1625 Broadway, Suite 1460
Denver, CO 80202

James Benway
Clerk, Court of Appeals

(SEAL)

Supreme Court
State of Colorado
Certified to be a full,
true and correct copy

JAN 14 1991
MAC V. DANFORD
Clerk of the
Court Supreme Court
Seal By /s/ Carolyn Scott
Deputy Clerk

SUPREME COURT OF COLORADO December 10, 1990
NO. 89SC696

SANDRA R. KEMP, Petitioner,
v.
STATE BOARD OF AGRICULTURE and COLORADO STATE UNIVERSITY; ROSELYN KELLER, in her capacity as Conciliation Officer of Colorado State University; DANA HIATT, in her capacity as Director of the Officer [sic] of Equal Opportunity at Colorado State University; and PHILLIP AUSTIN, in his capacity as President of Colorado State University, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

Holland & Hart
A. Bruce Jones
Ian S. Karpel
Denver, Colorado
Attorneys for Petitioner

Hall & Evans
Daniel R. Satriana, Jr.
Marlene T. Gresh
Sean R. Gallagher
Denver, Colorado

Duane Woodard, Attorney General
Tim Arnold, Deputy Attorney General
Lee Combs, Special Assistant Attorney General
State Board of Agriculture
Denver, Colorado
Attorneys for Respondents

JUSTICE ERICKSON delivered the Opinion of the Court. JUSTICE MULLARKEY dissents and JUSTICE LOHR and JUSTICE QUINN join in the dissent.

We granted certiorari to review *Kemp v. State Board of Agriculture*, 790 P.2d 870 (Colo. App. 1989), and we now affirm. The petitioner, Sandra Kemp, was a black female employee of Colorado State University (CSU), and was assigned as an extension agent in a predominately white community in Southern Colorado from August 16, 1982, until August 30, 1985. She alleges that starting in the Fall of 1983, she received lower than normal performance evaluations, and in the Spring of 1984 received a salary increase she felt was too low. In November 1984, Kemp filed a formal complaint with the CSU Equal Opportunity Office pursuant to CSU's internal grievance procedure manual[1] charging her co-workers and supervisors with discrimination due to her race and sex. The grievance procedure permits the complainant to elect either a formal or informal complaint and either an open or closed hearing. If a formal complaint is filed, a hearing panel of the school's equal opportunity council takes evidence and then prepares a written report setting out its findings and any resulting recommendations.[2] A formal complaint also means that the complainant has a right of appeal to an appeals committee and the president of the university. The grievance procedure also stated "complainants may pursue remedies in other agencies and the courts while

---

[1] Grievance Procedure for the Resolution of Complaints of Discrimination (hereinafter Grievance Procedure).

[2] Grievance Procedure at 4.

simultaneously invoking these procedures *informally.*" (Emphasis added.)[3] There is no definition in the internal procedure manual of a "closed hearing" nor any indication of what sanctions will be imposed for violating the procedure or criteria for determining appropriate sanctions. Kemp elected to file a formal complaint and to have a closed hearing.

On December 7, 1984, Kemp contacted the office of United States Senator William Armstrong (R. Colorado) and requested that his office monitor her complaint. Senator Armstrong's office responded by requesting that Kemp keep the senator advised. On January 27, 1985, after the hearing but before a decision had been rendered, Kemp's husband wrote another letter to Senator Armstrong's office on behalf of Kemp and with her knowledge and assistance. The letter asserted irregularities in Kemp's grievance hearing, that a university official had suggested Kemp quietly resign, and requested a review by the local United States Attorney's Office of "possible civil rights violations."[4]

---

[3] Grievance Procedure at 1.

[4] The full text of the letter is:

> My wife, Sandra, recently had an EEO hearing at CSU. I appeared as one of the witnesses.
>
> During the proceedings, we both observed too many irregularities practiced by the EEO office to prejudice the case in the defendants' favor. We are presently awaiting the panel's decision.
>
> Regardless of the decision, it has even been suggested that my wife quietly resign with the promise

(Continued on following page)

On February 13, 1985, the office in charge of investigating discrimination complaints at CSU wrote Kemp and informed her that the proceedings in her case had been "voided." The school stated that Kemp had violated the grievance rules by informing an outside party, Senator Armstrong, which was prohibited when the complainant elected to proceed with a formal complaint and a closed hearing. The letter informed Kemp that all internal mechanisms for lodging a discrimination complaint were exhausted.

Kemp appealed to the university president, who upheld the decision on March 22, 1985. Thereafter, Kemp filed a complaint in state district court alleging that CSU's action in terminating her proceedings violated her state constitutional rights and her federal first amendment rights to free speech, petition, and due process of law under the fourteenth amendment in violation of 42 U.S.C. § 1983. Following limited discovery, the parties filed cross motions for summary judgment. On November 5, 1987, the trial court ruled that her speech was not a matter of public concern and was not protected under

---

(Continued from previous page)

of good references because nothing will be probably done to the perpetrators.

Would your office please assist my wife in maintaining her employment at CSU? As you mentioned in your letter to Sandra dated December 13th, the Senator may request a *proper* review of my wife's complaints by the U.S. Department of Agriculture. Perhaps you might also, at your discretion, request an investigation of possible civil rights violations by the U.S. Attorney's Office.

Connick v. Myers, 461 U.S. 138 (1983). The court further ruled that even if protected, the state's interest in maintaining its procedures outweighed Kemp's interest and granted summary judgment for the state.

The court of appeals affirmed in *Kemp v. State Board of Agriculture*, 790 P.2d 870 (Colo. App. 1989), holding that Kemp's speech was not protected, and did not address the balancing of Kemp's interests with those of the state. For the reasons set forth in this opinion, we affirm.

I

The tension between the free speech rights of a state employee and the interests of a state employer was first addressed by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Pickering* reversed a decision upholding the termination of a public school teacher for writing a letter to the editor addressing an upcoming school bond issue. The Court held that "absent proof of false statements knowingly or recklessly made . . . , a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574. *Pickering* stated the problem was to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The teacher's relationship with the school board was "not the kind of closeworking relationship[] for which it [could] persuasively be claimed that personal loyalty and confidence [were] necessary to" the state's

interests in maintaining discipline or harmony within the workplace. *Id.* at 570.

In *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court held that the state was not constitutionally precluded from choosing not to renew a teacher's contract unless the teacher could show that the protected conduct at issue "played a 'substantial part' in the actual decision not to renew," and the state could not show that it would have reached the same decision "even in the absence of the protected conduct." Id. at 285-87. Then, *Connick v. Myers*, 461 U.S. 138 (1983), upheld the termination of an assistant district attorney based partially on her exercise of constitutionally protected speech. Once the employee showed that the speech "touched upon a matter of public concern," *id.* at 149, and was therefore protected, the burden shifted to the state to justify the termination by showing that its interests outweighed the employee's interests in exercising her free speech rights. *Id.* at 150.

Clarifying the balancing test, *Rankin v. McPherson*, 483 U.S. 378 (1987), held that a constable's office clerk could not be fired for stating that she hoped the President would be assassinated. "Where, as here, an employee served no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 391-92 (government's interest may be greater when speaker is in a policymaking role). The Court stated that the employee's speech "dealt with a matter of public concern," was a substantial motivation in the decision to fire the employee, and that the state's interests did not

outweigh those of the employee. *Id.* at 386-92. In performing that balancing, "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Id.* at 388.

In *Johnson v. Jefferson County Board of Health*, 662 P.2d 463, 473 (Colo. 1983), we said, "If the government could deny a benefit to a person solely because of the exercise of constitutionally protected speech, the exercise of that freedom would in effect be penalized and inhibited." In adopting the *Mt. Healthy* test, we stated, "The free speech interest of most government employees generally will be substantial enough to prohibit discharge or termination solely because of the employee's exercise of First Amendment rights on a matter of public interest." *Id.*[5] *See also Durango School Dist. v. Thorpe*, 200 Colo. 268, 275, 614 P.2d 880, 885 (1980) (balance will be struck in favor of the government "when it is demonstrated that the teacher's speech activities constitute a material or substantial interference with the teaching program, appropriate discipline, or the rights of others." (Citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).) It is with these factors in mind that we must review Kemp's claim that she was denied an employment benefit in retaliation for an exercise of a constitutionally protected activity.

---

[5] In *Johnson*, we also stated, "The constitutional balance weighs more heavily in favor of the governmental interest in efficient operations [] in the case of policymaking employees." *Johnson*, 662 P.2d at 473. CSU does not argue that Kemp was in a policymaking role.

II

As a preliminary matter, CSU has implicitly raised the issue that *Connick* is limited to those situations in which the employee is actually terminated, which Kemp was not. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court said that the state "may not deny a *benefit* to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." (Emphasis added.) *See also Johnson*, 662 P.2d at 472 (state cannot deny a "*benefit* to a person solely because of the exercise of constitutionally protected speech. . . . " (Emphasis added.) Although Kemp was not actually terminated because of the letter, she was denied an important employee benefit of access to the internal grievance procedure. The state cannot deny a benefit when it is constitutionally precluded from firing the employee for the same reason. CSU's assertion that *Connick* does not apply to these facts must therefore be rejected.

III

To determine whether CSU's actions violated Kemp's constitutional rights, we employ the four-step test created by the foregoing cases. First, Kemp must show that her speech "touch[es] upon a matter of public concern." *Connick*, 461 U.S. at 149. Second, if the speech is a matter of public concern, the burden shifts to the state to show that its interests outweigh the employee's interest, "as a citizen, in commenting upon matters of public concern. . . . " *Pickering*, 391 U.S. at 568. Third, if the state shows that the *Pickering* balance is weighed in its favor, it is unnecessary

to go further because the state has met its burden of showing that it terminated the employee or denied her a benefit for legislative reasons. If not, the employee must show that the protected activity was a substantial or motivating factor in the school's decision to deny the benefit. *Mt. Healthy*, 429 U.S. at 287. Finally, the school may still defeat the employee's claim if it can show that it would have reached the same decision even in the absence of the protected conduct. *Id.; see also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416 (1979).

A

Kemp's first burden is to show, by a preponderance of the evidence, that her speech touched on "matters of public concern" and therefore fell within the first amendment's protection. *Connick*, 461 U.S. at 138; *Johnson*, 662 P.2d at 472. If not, it is unnecessary to scrutinize the reasons for terminating the proceeding. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

The court of appeals upheld the trial court finding that Kemp's letter was not addressed to a matter of public concern since it focused "on [Kemp's] concerns about irregularities in her own hearing, rather than seeking to alert the senator or the public to broader discriminatory problems at the university." 790 P.2d at 872.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48 (footnote omitted).

Some courts have chosen to look primarily at motivation, or the "point" of the speech. *See. e.g., Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) ("*Connick* test requires us to look at the *point* of the speech in question" (citations omitted)); *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (is the employee's point to bring wrongdoing to light, raise issues of public concern because they are public concern, or to further some purely private interest?) Undoubtedly, Kemp's point in sending a letter was partially, if not entirely, motivated by self interest. Other courts, however, have not made that the sole determinative question. In *Johnson v. Lincoln University of Commerce*, 776 F.2d 443, 452 (3d Cir. 1985), the court said, "Speech touches upon a matter of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.' " (Quoting *Connick*, 461 U.S. at 146.) "[T]he mere fact that an employee's statement is an 'outgrowth of his personal dispute' does not prevent some aspect of it from touching upon matters of public concern, as *Connick* itself makes clear." *Johnson*, 776 F.2d at 451.

In *Connick*, an assistant district attorney, who was unhappy about a pending transfer, circulated a questionnaire soliciting her co-workers' comments on office management. For the most part, the Court viewed Myers' speech as "mere extensions of Myers' dispute over her transfer. . . . " *Connick*, 461 U.S. at 148. The Court did

find, however, one question directed to whether attorneys were pressured to work on political campaigns to be of public concern, notwithstanding that the question arose out of Myers' personal dispute or that it was aimed at solving a private problem. *Id.* at 149. *See also Zamboni v. Stamler*, 847 F.2d 73, 77-78 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988) (employee's speech touched upon public concern even though his sole purpose was to invalidate a promotional plan adverse to him); *Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) ("Dismissing Rode's speech as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out."); *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (employee's letter complaining of sexual harassment public concern although letter arose from conflict between teacher and principal).

Here, Kemp wrote a letter to her elected representative complaining of irregularities in the grievance hearing, alerting the senator to the possibility that no action would be taken regardless of the outcome, and requesting that the United States Attorney's Office "investigate[] possible civil rights violations."

At least part of Kemp's letter seems directed at exposing racial discrimination problems within the university. We recognize that there is a significant difference between questions surrounding the fairness of office transfer policies, as in *Connick*, and questions concerning racial discrimination, which are presented here. "[I]t is

clear that [the employee's statement in *Givhan*] concerning School District allegedly racially discriminatory policies involved a matter of public concern." *Connick*, 461 U.S. at 146. It cannot be said speech that touches upon discrimination within a university system does not relate to "any matter of political, social, or other concern to the community." *Johnson*, 776 F.2d at 452. This case is similar to *Rode*, in which the Third Circuit emphasized that the plaintiff was not merely complaining about being mistreated, "she claimed that she was a victim of retaliation arising out of racial animus. . . . " 845 F.2d at 1201. "If, in fact, the employee's speech is largely composed of matters of only personal concern, that becomes relevant when the balancing is done, not in the determination whether the speech touches upon matters of public concern." *Johnson*, 776 F.2d at 451.

Although the context within which Kemp's letter arose was one in which she had a personal stake, it was nevertheless a context in which charges of racial discrimination had been filed. The very purpose of the grievance was to address alleged discrimination, which the grievance manual defines as any act or policy that violates any of a multitude of state and federal anti-discrimination laws, all of which are public matters.[6] Moreover, the form of the speech – a letter to a United States senator, only lends credence to the argument that the speech touched on a matter of public concern.

When an employee alleges a colorable claim that a university is guilty of racial discrimination, it is a matter

---

[6] Grievance Procedure at 2.

of public concern, and the fact that she has a personal stake in the outcome does not alchemize that claim into a purely private matter in which the public has no interest.

B

In holding that Kemp's letter touched on a matter of public concern, we have only resolved one part of the *Connick* test. Even though speech may be of public concern, it is still incumbent upon the court to balance the interests of the speaker with those of the state in its capacity as an employer. "The inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7. That balancing requires "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. In this case, CSU argues that its interests are in maintaining the integrity of its grievance procedure, which Kemp violated. Here, the state "bears a burden of justifying [terminating the procedure] on legitimate grounds." *Id.* Relevant factors include "the manner, time, and place of the employee's expression . . . [and] the context in which the dispute arose." *Rankin*, 483 U.S. at 389.

CSU's grievance manual provides that an employee may select a formal or informal procedure, and an open or closed hearing. If the employee selects a formal procedure, she may not seek remedies in other agencies or the courts until the hearing is complete. Although the manual neither defines what a closed hearing is, nor specifies what sanctions will occur if any of the provisions are violated, "closed" clearly indicates that outside forces may not be invited into the proceedings until a

decision has been rendered. Kemp's interest here, then, is slight. She was given the choice to elect a formal or informal procedure, and an open or closed hearing. She chose a formal, closed proceeding and then violated that procedure by involving an outside individual in hopes of influencing a favorable result.

An employee cannot invoke the first amendment's protection by simply using the term "discrimination." There must be some attempt to inform the public of discriminatory practices rather than a motive primarily aimed at simply "gather[ing] ammunition for another round of controversy with her superiors." *Connick*, 461 U.S. at 148. Kemp's letter is entirely couched in terms of what the senator could do to help her, rather than exposing an alleged university discrimination problem to the public. Kemp's reference to the United States Attorney's Office seems primarily aimed at eliciting an investigation of her complaint, rather than alerting the public to a larger problem. In other words, the sole motivating factor for the letter was to further Kemp's own cause, rather than a larger, more publicly important problem. As in *Connick*, "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the [state]." 461 U.S. at 153. Kemp's letter "touched on matters of public concern in only a most limited sense; [Kemp's letter], in our view, is most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154.

Balanced against Kemp's interest is the school's interest in having an internal grievance procedure that is followed by all parties. Although unartfully drawn,

CSU's grievance procedure is clear enough for Kemp to have understood the consequence of selecting a particular method for solving her complaint. That she decided to go outside that procedure cannot now be held against the university.

The state has met its burden of showing that Kemp's letter "impair[ed] discipline by superiors or harmony among co-workers, [had] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[ed] the performance of the speaker's duties or *interfer[ed] with the regular operation of the enterprise.*" *Rankin*, 483 U.S. at 388 (quoting *Pickering*, 391 U.S. at 570-73) (emphasis added). That Kemp's letter is composed of matters of only personal concern to her weighs against her in the balancing. *Johnson*, 776 P.2d at 451. Given the circumstances, the trial court correctly found that CSU's interest in maintaining its grievance procedure outweighed whatever interest Kemp had.

IV

Neither this court nor the United States Supreme Court has addressed the problem of whether a person's right to petition under the first amendment is balanced under the *Connick* test. Even assuming that Kemp's right to petition was implicated, the *Pickering/Connick* balancing test is equally applicable in deciding whether the state's interest as an employer outweighs the first amendment interest of the employee. There is no more of an absolute right to petition than there is to engage in

speech. *McDonald v. Smith*, 472 U.S. 479 (1985) (petition clause does not grant absolute immunity to libel action):

> [T]he Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is [not] absolute. For example, filing a complaint in court is a form of petitioning activity; but "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983); accord, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Similarly, petitions to the President that contain intentional and reckless falsehoods "do not enjoy constitutional protection," *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). . . .

Id. at 484.

At most, Kemp waives her right to petition for only the amount of time needed for the formal grievance procedure to run its course, and then only if she chooses that procedure. We can find no stronger interest here than Kemp had under the free speech clause, and the state's interest is equally compelling. Once again, the state has met its burden of showing that it terminated the procedure for legitimate reasons. *Connick*, 461 U.S. at 150.

V

Because we hold that the state's interest outweighs Kemp's interest in her rights to free speech and to petition, it is unnecessary to go further and determine whether Kemp's conduct was a substantial or motivating factor in the school's decision to void the procedure, or

whether the procedure would have been terminated absent the protected conduct.

Accordingly, we affirm the trial court and the court of appeals.

JUSTICE MULLARKEY dissents and JUSTICE LOHR and JUSTICE QUINN join in the dissent.

SANDRA R. KEMP -v- STATE BOARD OF AGRICULTURE, No. 89SC636

JUSTICE MULLARKEY dissenting:

Although I agree with the majority's formulation of the four-step analysis used to examine Kemp's First Amendment claim, I do not agree with the application of that test to the facts of this case. In addition, I would address Kemp's due process claims and hold that CSU's actions violated Kemp's procedural due process rights. Accordingly, I respectfully dissent.

In this case Kemp alleged that she suffered racial and sexual discrimination both at work and during the grievance procedure. Kemp's husband wrote a letter to Senator Armstrong in connection with Kemp's complaint of racial and sexual discrimination before Colorado State University's (CSU's) Equal Employment Opportunity Office (EEO) and suggested that Senator Armstrong investigate "possible civil rights violations." The letter referred to "irregularities practiced by the EEO office" during the grievance proceedings and pointed out that a university official had suggested to Kemp that she quietly resign.

See maj. op. at n.4 (full text of letter). The letter to Senator Armstrong also included a complaint from another CSU employee alleging discrimination.

CSU "voided" Kemp's grievance because she contacted Senator Armstrong after completion of the hearing but before the hearing panel issued its decision. In its decision, the hearing panel found that Kemp's workplace was organized in a way that promoted both institutional sexism and racism.[1] The panel recommended, in addition to transferring Kemp to a comparable position elsewhere in the Extension Service, that Kemp's office review its personnel policies with the aid of an outside reviewer. Because the grievance was voided, however, the panel's decision had no effect.

Under the four-part test adopted by the majority, Kemp must first show that her speech "touched upon a matter of public concern." Maj. op. at 8 (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)). In this case Kemp's speech directly addressed a matter of extreme public concern. Allegations of race- and sex-based discrimination by a government employer are "a matter inherently of public concern." *Id.* at 148 n.8 (discussing *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)).

---

[1] Although Kemp's grievance procedure was voided prior to the hearing panel's issuing its decision, the panel had reached its decision prior to the voiding of the procedure and the decision is part of the record in this case. (Plaintiff's Exhibit 11).

The crucial question in this case is whether the State has met its burden of showing that its interest in maintaining the integrity of its grievance procedure outweighs Kemp's interests, "as a citizen, in commenting upon matters of public concern." Maj. op. at 9 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). The State argues, and the majority agrees, that Kemp violated CSU's grievance procedure by contacting an outside individual after choosing the formal, closed proceeding to pursue her discrimination complaint. The majority concludes that the State's interest in the integrity of its procedure, which Kemp allegedly violated, outweighs Kemp's interests in commenting upon the racial and sexual discrimination she allegedly suffered.[2] I disagree.

Initially, I note that CSU's grievance procedure manual contained no prohibition preventing Kemp from contacting Senator Armstrong. CSU's grievance manual, in describing its policy, merely states: "Although the use of this procedure may obviate the necessity for complainants to resort to outside procedures in some cases, complainants may pursue remedies in other agencies and the courts while simultaneously invoking the procedure informally." The manual does not state that an employee who chooses to file a formal complaint may not seek

---

[2] The majority reasons that, because Kemp was given a choice of proceedings, her interest in commenting upon the racial and sexual discrimination that she allegedly suffered is "slight." It is unclear, especially in light of Kemp's reference to "irregularities" in the process and the suggestion that Kemp resign, why Kemp's having a choice of proceedings renders her interest in commenting upon this alleged discrimination "slight."

remedies in other agencies or courts during the formal procedure. Moreover, even if this procedure prevents complainants who file formal complaints from simultaneously pursuing remedies in other agencies or courts, the provision does not prohibit Kemp from writing her senator. Senator Armstrong is not an agency or court.

The majority, without analysis, also chooses the most restrictive definition of a "closed" hearing: that "closed" means no outside forces may be involved in the proceedings until after the EEO has reached a decision. As the majority concedes, however, the manual does not define what a "closed" hearing is. Kemp argues that the hearing was completed before she contacted Senator Armstrong and that the "closed" hearing restriction did not continue until the panel rendered its decision. Given the absence of any definition of "closed" hearing, Kemp's construction is not unreasonable and it is consistent with language in the policy indicating the panel will issue its decision within ten days "after the close of the hearing." The manual also does not specify sanctions for failure to follow the procedure for a "closed" hearing. When CSU wanted to impose sanctions elsewhere in the manual, it did so expressly. Therefore, it is unfair to read into the manual such a drastic sanction as the voidance of the grievance where neither guidelines for a "closed" hearing nor any sanctions are specified.

In this case, then, I would conclude that the integrity of the grievance procedure was not impugned. Kemp violated no regulations justifying the State's terminating her grievance proceeding. In addition, if the State had a strong interest in the integrity of its grievance procedure, the State could have issued more specific guidelines to

govern the procedure. The State's interest in maintaining the integrity of the grievance procedure in this case therefore is minimal.

In concluding that the State's interest outweighed Kemp's interest, the majority also emphasizes that Kemp, in the letter to Senator Armstrong, sought help in her dispute with CSU rather than to communicate a racial and sexual discrimination problem to the public. Maj. op. at 14-16. Kemp's primary purpose of alerting Senator Armstrong to her alleged problems with racial and sexual discrimination at work and during the grievance proceedings, however, does not resolve the balancing of interests in the State's favor. The fact that the employee has a personal stake in the controversy that is the subject of the speech in question does not mean that the State's interest in fulfilling its responsibilities to the public outweighs the employee's interests in commenting upon matters of public concern.[3] *Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) (holding that an employee suspended because of the employee's participation in an interview concerning her employment problems with a state police department "did not impermissibly affect the State's interest in the efficiency and performance of the police department" and that the employee therefore was entitled to damages arising from the suspension).

In addition, in balancing Kemp's interests against those of the State, the majority, relying heavily on *Connick v. Myers*, 461 U.S. 138, sidesteps several important factors

---

[3] It should again be noted here that Kemp enclosed another employee's complaint alleging previous discrimination at CSU in her letter to Senator Armstrong.

for determining whether the State's interest outweighs Kemp's interests. Most importantly, the majority bypasses the importance of the content of Kemp's statements, the crucial factor in balancing the State's and the employee's. interests. *Connick*, 461 U.S. at 150, 152 ("the State's burden in justifying a particular [action] varies depending upon the nature of the employee's expression. . . . We caution that a stronger showing [of the employer's justification for its actions in response to the employee's speech] may be necessary if the employee's speech more substantially involve[s] matters of public concern."). All of the statements for which Kemp seeks protection concerned alleged racial and sexual discrimination, a matter of inherently public concern. In *Connick*, on the other hand, all but one question of fourteen questions on the employee's questionnaire dealt with matters *not* of public concern. *Id.* at 148.

The Supreme Court also emphasized that the employee in *Connick* did not seek in distributing the questionnaire to bring to light any "breach of public trust." *Id.* at 148. The *Connick* employee's questions, all but one of which dealt with internal office policy, focused on "gather[ing] ammunition for another round of controversy with her superiors." *Id.* The situation in this case is altogether different. It is a breach of the public trust when a government employer practices racial and sexual discrimination and Kemp's letter to Senator Armstrong dealt exclusively with allegations of such discrimination.

There also is no evidence that Kemp's letter reduced her abilities to perform her duties at work, nor is there any evidence that Kemp's speech disrupted her workplace, both important considerations in *Connick*. *Id.* at

151-52. Kemp, unlike the plaintiff in *Connick*, did not exercise her right of speech while at work. *Id.* at 153. As discussed above, the letter on behalf of Kemp to Senator Armstrong also did not violate any State policy. *Id.* at 153 n.14 ("The violation of such a rule would strengthen [the State's] position.") (citation omitted).

When all of these relevant factors are considered, I believe Kemp's interests in commenting upon racial and sexual discrimination at work and during the grievance procedure outweigh the State's interest in maintaining the integrity of its grievance procedure in this case. The two remaining issues from the four-part test adopted by the majority are questions of fact not before this court. Thus, I would reverse the judgment of the court of appeals with directions to remand the case to the trial court for resolution of the remaining issues of the majority's four-part test.

The majority also does not address the resolution of the plaintiff's due process claims. I would hold that CSU's actions violated Kemp's right to due process.[4]

This court previously has held that a public employer's failure to provide an employee with the benefits of a procedure as required by policies which it has adopted is a violation of the employee's procedural due process rights. *Department of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984). In *Donahue*, this court found that

---

[4] Although the reviewing court did not address Kemp's due process claims, this court may still address this issue since the parties raised the issue in their trial court pleadings. *Patterson v. Cronin*, 650 P.2d 531, 535 n.9 (Colo. 1982).

the Department of Health's failure to accord an employee with a predisciplinary hearing as required by a personnel rule was a violation of that employee's procedural due process rights. We stated: "When the state, however, promulgates a regulation that imposes on governmental departments more stringent standards than are constitutionally required, due process of law requires those departments to adhere to those standards in discharging employees." *Id.* Once the State promulgated the rule, the employee had a right to that procedure before being discharged. The rule was binding until amended and was enforceable by an employee to whom it applied. *See also Ness v. Glasscock*, 781 P.2d 137 (Colo. Ct. App. 1989) (police officer had right to be terminated only after strict compliance with the applicable termination procedures). All ambiguities in the policy should be construed against CSU as the drafter of the policy.

The grievance procedure involved in this case was approved by the State Board of Agriculture which oversees the operation of CSU. Once approved and adopted, the procedure became binding upon CSU. Thus, as in *Donahue*, Kemp had the right to have her grievance heard pursuant to the procedure. As discussed above, Kemp's letter to Senator Armstrong did not violate the grievance procedure. CSU's termination of Kemp's grievance proceedings thus violated Kemp's right to procedural due process as required by CSU's grievance procedure manual. In addition, even if Kemp violated the grievance procedure, the policy does not specify that such violation would result in the forfeiture of Kemp's right to pursue the proceeding altogether. Because of the importance of Kemp's right to have her grievance heard, I see no reason

to read such a harsh penalty into the terms of the grievance procedure.

For the foregoing reasons, I respectfully dissent.

JUSTICE LOHR and JUSTICE QUINN join in this dissent.

THE COURT OF APPEALS
OF THE STATE OF COLORADO

Case Number 88CA0347 & 88CA0899

ORDER

SANDRA R. KEMP v. STATE BOARD OF AGRICULTURE, et al,

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 12-26-89 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

(Seal)

Hume, J.

Smith, J.

Plank, J.

DATED: November 24, 1989

COPIES MAILED TO
COUNSEL OF RECORD
ON 11-24-89
By DLP
COLORADO COURT OF APPEALS

COLORADO COURT OF APPEALS

No. 88CA0347
No. 88CA0899

SANDRA R. KEMP,

Plaintiff-Appellant,

v.

STATE BOARD OF AGRICULTURE and COLORADO STATE UNIVERSITY; ROSELYN KELLER, in her capacity as Conciliation Officer at Colorado State University; DANA HIATT, in her capacity as Director of the Office of Equal Opportunity at Colorado State University; and PHILLIP AUSTIN, in his capacity as President of Colorado State University,

Defendants-Appellees.

COURT OF APPEALS STATE OF COLORADO

Opinion filed and judgment entered on the 2nd day of November, 1989.
(Seal)
Clerk of the Court
/s/ James C. Benway

Appeal from the District Court
of Larimer County
No. 86CV1162

Honorable William F. Dressell, Judge

DIVISION II
Opinion by JUDGE HUME
Smith and Plank, JJ., concur

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

Holland & Hart
A. Bruce Jones
Jay S. Jester
Denver, Colorado

Attorneys for Plaintiff-Appellant

Hall & Evans
Daniel R. Satriana, Jr.
Marlene T. Gresh
Sean R. Gallagher
Denver, Colorado
Duane Woodard, Attorney General
Lee Combs, Assistant Attorney General
Denver, Colorado
Attorneys for Defendants-Appellees

Plaintiff, Sandra R. Kemp, appeals the judgment of the trial court dismissing her claims for damages brought against defendants, Colorado State Board of Agriculture, Colorado State University, Philip Austin, Dana Hiatt, and Roselyn Keller. We affirm in part and reverse in part.

While employed by the university as an extension agent, plaintiff filed a formal grievance with the university accusing her supervisor and certain other employees of improper racial and sexual discrimination.

Under policies established by the university's Grievance Procedure for the Resolution of Complaints of Discrimination (Grievance Manual), upon the filing of a "formal complaint," the merits of the grievance are to be determined in formal hearings to be conducted by, or at the direction of, the university. Such proceedings may be closed to the public and made subject to a rule of confidentiality at the request of the grievance complainant. The Grievance Manual further provides that upon filing a formal complaint, the complainant is prohibited from pursuing alternative remedies involving other agencies, including the invocation of court proceedings during the pendency of the grievance process. *See* Grievance Manual §IV B.

In conformity with its Grievance Manual and upon plaintiff's request, the university scheduled and held a formal, closed hearing to determine the merits of plaintiff's grievance. Following the hearing, but before a decision had been reached, plaintiff's husband, with plaintiff's knowledge, approval, and assistance, wrote to United States Senator William Armstrong asking the senator to assist his wife in maintaining her employment, and to complain of perceived "irregularities" which allegedly had occurred during the hearing. The letter also invited Senator Armstrong to request, at his discretion, an investigation by the United States Attorney's office into civil rights violations allegedly perpetrated by the university.

When the senator made inquiry of the university, the latter notified plaintiff that her grievance proceedings had been rendered void because she had breached the Grievance Manual's requirements of confidentiality and exclusivity. The internal grievance proceedings were then terminated, and no determination was made upon the merits of plaintiff's grievance.

After unsuccessfully appealing the termination of her grievance proceeding to the university's president, plaintiff commenced this action in the state district court under 42 U.S.C. §1983 (1982). In her complaint, plaintiff requested damages and injunctive and declaratory relief, claiming that the university's termination of her grievance proceeding violated her right to free speech, her right to petition, and to due process of law.

The district court granted defendants' motion for summary judgment, dismissed plaintiff's claims, and

later awarded attorney fees to defendants pursuant to §13-17-101, et seq., C.R.S. (1987 Repl. Vol. 6A). From that judgment, plaintiff appeals.

I.

Plaintiff contends that, by voiding the grievance proceedings solely on the basis of her letter to Senator Armstrong, her First Amendment right to free speech was denied. We disagree.

The question of whether the words of a governmental employee are constitutionally protected speech entails striking a balance between the employee's interest, as a citizen, in commenting upon matters of public concern, and the state's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *See Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *See Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

Here, the letter to Senator Armstrong focuses on plaintiff's concerns about irregularities in her own hearing, rather than seeking to alert the senator or the public to broader discriminatory problems at the university. Further, the irregularities listed by plaintiff in her deposition were concerns of a personal nature related to the conduct of her grievance hearing, rather than broader community concerns.

We conclude that the speech at issue was not a matter of public concern rising to the level of constitutionally protected expression that entitled plaintiff to a remedy under §1983. Therefore, because plaintiff's speech is not a matter of public concern, we are not required to balance her interests against those of the state. *See Pickering v. Board of Education, supra. Connick v. Myers, supra.*

Plaintiff further contends that defendants denied her First Amendment right to "petition the government for redress of grievances." We disagree.

Here, plaintiff requested a formal, closed hearing to review her discrimination claims. Under the university's Grievance Manual §IV B, plaintiff was precluded from pursuing other remedies only during the pendency of those proceedings. Thus, plaintiff retained her constitutional right to petition for a redress of grievances after the close of her formal hearing.

Here, by contacting the senator prior to the conclusion of the proceeding, plaintiff was not seeking redress of grievances concerning the alleged discriminatory practices, but rather, was inviting interference with and seeking to influence the result of a proceeding already in progress. Therefore, we conclude that plaintiff's First Amendment right to petition was not denied.

II.

Plaintiff contends she is entitled to a non-statutory cause of action for damages resulting from a violation of her state constitutional rights to free speech and petition. We disagree.

This court has adopted the standards set forth in *Pickering v. Board of Education, supra,* and *Connick v. Myers, supra,* for determining whether the words of a governmental employee are constitutionally protected speech under Colo. Const. art. II, §10. *Lockhart v. Board of Education,* 735 P.2d 913 (Colo. App. 1986).

Plaintiff does not contend on appeal that the state right to petition is broader or confers greater rights than those established by the First Amendment. And, in our view, the language granting the right to petition for a redress of grievances under Colo. Const. art. II, §24, is not significantly broader than that contained in the First Amendment. Since we have determined plaintiff's claims asserted under the United States Constitution to be without substantive merit, and since her state constitutional rights have not been shown to be broader than her First Amendment rights, we decline to consider whether a non-statutory remedy to vindicate such rights exists in Colorado.

III.

It should be noted that during the pendency of this appeal, the United States Supreme Court decided *Will v. Michigan Department of State Police,* 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Since we have determined that plaintiff's claims were properly dismissed for lack of substantive merit, we need not address the impact of *Will* upon this case. Hence, we do not determine the issues addressed in the supplemental briefs.

IV.

Plaintiff contends that the trial court lacked jurisdiction to award attorney fees and that, even if the court had proper jurisdiction, it erred in awarding such fees pursuant to defendants' motion. We agree that the court erred in determining that plaintiff's action was groundless and, therefore, decline to address plaintiff's jurisdictional contention.

Section 13-17-101, et seq., C.R.S. (1988 Repl. Vol. 6A) provide the basis for awarding attorney fees when a substantially frivolous or groundless action is brought or maintained.

A claim is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim. This test does not apply to a meritorious action that proves unsuccessful, a legitimate attempt to establish a new theory of law, or a good-faith effort to extend, modify, or reverse existing law. *In re Application of Talco, Ltd*, 769 P.2d 468 (Colo. 1989). *See also Western United Realty v. Isaacs*, 679 P.2d 1063 (Colo. 1984).

A claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss, are not supported by any credible evidence at trial. *In re Application of Talco, Ltd; Western United Realty, supra.*

Here, plaintiff's claims were based largely upon federal case law, and involved novel questions of law upon which there was no determinative authority in Colorado. Furthermore, plaintiff's letter, taken in a light most favorable to her, contains some language that, taken alone, arguably supported her claims. Therefore, while we agree

with the trial court's rejection of plaintiff's claims, we cannot conclude that the assertion of those claims was either substantially frivolous or substantially groundless. Thus, the award of attorney fees in favor of defendants cannot stand.

The part of the judgment dismissing plaintiff's complaint is affirmed. The part of the judgment awarding attorney fees to defendants is reversed.

JUDGE SMITH and JUDGE PLANK concur.

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO

Case No. 86CV1162

ORDERS

SANDRA R. KEMP,

Plaintiff, (Filed Nov 5 1987)

vs.

STATE BOARD OF AGRICULTURE, et.al.,

Defendants.

The Court incorporates herein the facts as summarized or set forth in the parties [sic] briefs. In summary, the Plaintiff Sandra Kemp was employed as an extension agent by Colorado State University assigned to a rural office in Eastern Colorado. During her employment, the Plaintiff filed a "formal complaint" with CSU's Equal Opportunity Office (pursuant to a grievance procedure for resolution of complaints of discrimination) charging certain of her co-workers and her supervisor with discrimination due to her race and sex. The Plaintiff pursuant to the grievance procedure requested both a "formal" proceeding and a "closed hearing".

A designation of a complaint as "formal" means that once a Complaint is filed, the Complainant is prohibited from pursuing remedies in "other agencies and the courts" while simultaneously invoking CSU's internal procedures. "Formal" designation also means that Complainant requests a hearing before a hearing panel of the

Equal Opportunity Office with rights to appeal the decision to the Appeals Committee and the President of the University. Per the grievance procedure, a "closed" hearing is one in which there are to be no contacts about the hearing to individuals other than the parties, their representatives, the hearing panel, witnesses asked to present testimony and persons with officially designated roles.

The Complaint was filed on November 9, 1984. On or about December 7, 1984, the Plaintiff contacted the Office of the United States Senator William Armstrong requesting that his office monitor her complaint (Plaintiff sent a written message to the Senator's office). The Plaintiff received an acknowledgment from a representative of the Senator that his office received Plaintiff's correspondence. On or about January 25, 1985 a formal closed hearing was begun and the matter was taken under advisement. On or about January 27, 1985 the Plaintiff participated in the drafting of a letter over the signature of her husband which was sent to Senator Armstrong's office alleging irregularities by the "CSU" Office of Equal Opportunity resulting in prejudicing the case in favor of the Defendant and requesting assistance, etc. Senator Armstrong's representatives then contacted the Director of CSU Extension Service regarding the letter. On February 12, 1985, Senator Armstrong's office was advised that the Plaintiff's proceedings were being voided because of contact with the Senator's office. The Plaintiff was later advised that the proceedings had been voided and no decision on the merits would be forthcoming. The Plaintiff on March 2, 1985 appealed this decision to the President of Colorado State University who reviewed the

decision to void the proceedings and found no basis for overruling that determination.

The four claims for relief of Plaintiff's Complaint are premised upon alleged violation of constitutional rights by the voiding of the grievance procedure.

The first question that needs to be addressed is whether or not the Plaintiff's contact with Senator Armstrong was "speech" or a "petitioning" guaranteed or protected by the first amendment. This Court unequivocally finds that the communication with Senator Armstrong initiated by the Plaintiff is not such protected speech. In reviewing the "content – form-context", the contact with Senator Armstrong's office was made out of personal concern for what she perceived as "irregularities" in her particular hearing. Plaintiff was seeking the authority, prestige and influence of Senator Armstrong's office and furtherance of her cause and not to advance any "legitimate public concern". While Plaintiff did raise claims of discrimination, the setting was an internal one to allow the State as an employer to determine if additional internal action needed to be taken to address the matters raised and promote the efficiency of public services performed through this particular agency and its employees. If discrimination occurred or was found to exist, then Defendant could chose an appropriate redress for the wrongs or pursue other appropriate remedies. It could well have been that any decision reached or subsequent actions of the Defendant may eventually have amounted to a matter of public concern giving rise to the right of Plaintiff to speak out; but such was not the context of the speech at issue herein.

Likewise, Plaintiff asserts that the communication was to a U.S. Senator and thus comes within the protections of the "petition provisions" of the First Amendment. The Court would likewise find this argument to be lacking and finds that Plaintiff was not seeking redress but "inviting interference" with a proceeding in process. There is no legitimate response or service that Senator Armstrong could render or provide as a U.S. Senator at this stage of the proceedings.

Second, even if the speech was constitutionally protected, the Court in balancing the interests of the Plaintiff with that of the State, the Court would have to find the interest of the State as the employer promoting the providing of hearings pursuant to adopted procedure far outweighs any interest advanced by Plaintiff's speech. Plaintiff chose the forum in which to have her concerns heard. She knew the rules and choose the type of hearing. However Plaintiff intentionally violated the rules under which the proceedings were being conducted and must suffer the consequences of the decision to void the proceedings. As pointed out in the arguments, Plaintiff could have chosen another type of proceeding which allowed for public involvement or Plaintiff could have waited until the proceedings were concluded and then pursue her "contact". The procedure as adopted by the Defendant for these types of hearings do not prohibit the Plaintiff from later pursuing rights or seeking redress (Plaintiff did eventually pursue other avenues) and there is no allegation that the voiding of these proceedings were in any way related to *"any adverse employment action taken against Plaintiff"*. One has to question the motive

and necessity for Plaintiff's contact with Senator Armstrong at the time it was made. As the Court stated at oral arguments: what assistance or service were realistically being sought by the Plaintiff? The Defendant did have a legitimate interest in maintaining the integrity of the proceedings. Plaintiff seeking of outside interference is not only violative of the known rules of said procedure but repugnant to the concept of having a hearing free from influences no matter what the source. The Court is aware that circumstances may arise that do require intervention but where is the compelling necessity to have violated the rules in this particular matter? Therefore, the Court finds that Defendants have not denied Plaintiff any of her rights, privileges or immunities secured by the United States Constitution. Specifically Defendants have not denied her rights as to free speech; nor to petition the government; nor have they deprived the Plaintiff of any rights under the Colorado constitution by virtue of their having "voided the proceedings in question".

The Court further finds that the Plaintiff has failed to show a basis whereby this Court should enter declaratory relief directed toward the grievance procedure in question nor any equitable basis for an injunctive order requiring reinstatement of the proceedings and requiring that a decision be issued on the merits. The Court has found that what occurred resulted from the knowing and intentional acts on the part of the Plaintiff. The actions of the Defendants were appropriate responses to Plaintiff's activity.

Therefore, the Court finds that Plaintiff should take nothing by her first, second, third or fourth claims for

relief and that judgment should enter in favor of the Defendants for their costs as allowed by law.

Anticipating that an issue may arise regarding attorneys fees, the Court would make the following comments regarding whether the Court should exercise its discretion and authority to grant attorney fees to the "prevailing party". This Court is very concerned about the validity and purpose of Plaintiff's complaint. The Complaint is artfully drawn and on its face appropriately alleges constitutional violations. It is a cornerstone of our form of government that allegations of violations of constitutional rights are serious matters that not only require but justify close scrutiny by Courts no matter how trivial or insignificant the acts or activity that give rise to these allegations appear to be. In this case, one looking at the totality of the material presented might question: what loss did Plaintiff really sustain? The answer is the right to have an internal review of her allegations and findings leading to fashioning appropriate remedy if discrimination was found. It matters not that the Defendant did not take punitive action actively or implicitly against Plaintiff's employment status; it only matters that an avenue to investigate and determine whether discrimination occurred was lost. Loss of such a procedure is not one to be taken lightly but is of utmost serious concern as government cannot accept nor allow such discrimination to occur within its own activities. However, existence or non-existence of discrimination is not and was not an issue involved herein. The issues focused on Defendant's actions in voiding the grievance procedure. The Court has found that this occurred solely due to the conduct of

the Plaintiff and that the Plaintiff has to bear the consequences of her willful acts. If this were an action based upon a common law or other State cause of action, the Court would entertain further arguments whether to find "frivilous or groundless."

Therefore, if counsel for the Defendant believe that they can convince the Court to award attorneys fees, then they should within 15 days submit memorandums to the Court setting forth legal authority and argument for awarding attorney fees with Plaintiff to respond in 10 days.

By the Court this 5th day of November, 1987.

/s/ William F. Dressel

WILLIAM F. DRESSEL
District Court Judge

Copies Sent To Attorney of Record
On 11-9-87

Colorado State University
Fort Collins, Colorado
80523

Conciliation Office
221 Student Services Bldg.
303/491-7548

February 13, 1985

Ms. Sandra Kemp
P.O. Box 406
Eads, CO 81036

Re: Formal Hearing on
Discrimination
Case No. 002-AY1984-85

Dear Ms. Kemp:

This letter is to inform you that the proceedings in Case 002-AY1984-85 have been voided in their entirety. Let me speak to the reasons for this decision.

The Grievance Procedure for the Resolution of Complaints of Discrimination is an internal mechanism which specifically states that it may be utilized in conjunction with outside agencies only in its *informal* aspects. However, the Complainant pursued outside assistance while simultaneously invoking *formal* aspects of the Grievance Procedure. Such action is a direct violation of the Grievance Procedure.

In addition to the above, the procedures contain a provision for an open or closed hearing at the choice of the parties, with power vested in the Hearing Panel to decide in the event of a conflict between the parties. In her complaint, the Complainant indicated her preference for a closed hearing as did the respondents in their reply. Thus the entire process was a closed one and all parties

were duly notified of this fact. By contacting and transmitting a copy of the formal complaint to an outside agency before the process was completed, the closed nature of the proceedings was breached.

The Complainant has exhausted all internal mechanisms for resolution of her complaint of discrimination since involving one procedure formally precludes the use of all other formal channels available at CSU. The Complainant may pursue remedies in other agencies and the courts.

The necessity of this decision is regrettable, but it is the only appropriate one if the integrity of the procedures is to be maintained.

Very truly yours,

/s/ Roselyn J. Keller
Roselyn J. Keller
Conciliation Officer

c: Leonard T. Pruett
George H. Ellicott

cc: Dana S. Hiatt

Colorado State University
Fort Collins, Colorado
80523

Office of the President
102 Administration Building
303/491-8211

March 22, 1985

Ms. Sandra Kemp
P.O. Box 101
Aurora, CO 80040

Re: Case No. 002-AY1984-85

Dear Ms. Kemp:

This is in response to your letter regarding the decision of the Conciliation Officer, Office of Equal Opportunity to void the proceeding in the above referenced case. I have reviewed that decision and can see no basis for overruling it.

It does not appear that Ms. Keller's interpretation is inconsistent with the procedures, and any activity by you which attempts to involve agencies outside the university is inappropriate.

The decision of the Conciliation Officer, made in conjunction with the Director, Office of Equal Opportunity, was that the Proceedings in and of themselves were invalid due to your actions in contacting the Senator's office and requesting action on his part. Given these circumstances, the decision properly rested with the Office of Equal Opportunity.

It is my understanding that the Hearing Panel completed its report and no action by the Conciliation Officer interfered with its activities.

I am sorry that this situation occurred, but I feel the proper steps were taken and I support the decision which was reached.

Sincerely,

/s/ Philip E. Austin
Philip E. Austin
President

/jh

Post Office Box 101
Aurora, Colorado 80040
January 27, 1985
(303) 340-4324

Ms. Joann L. Gelvin
Staff Assistant
Office of Senator William L. Armstrong
103 Steele Street, Suite 103
Denver, Colorado 80206

Reference: Sandra R. Kemp's Equal Employment Opportunity (EEO) Hearing at Colorado State University (CSU)

Dear Ms. Gelvin:

My wife, Sandra, recently had an EEO hearing at CSU. I appeared as one of the witnesses.

During the proceedings, we both observed too many irregularities practiced by the EEO office to prejudice the case in the defendants' favor. We are presently awaiting the panel's decision.

Regardless of the decision, it has *even* been suggested that my wife quietly resign with the promise of good references because nothing will be probably done to the perpetrators.

Would your Office please assist my wife in maintaining her employment at CSU? As you mentioned in your letter to Sandra dated December 13th, the Senator may request a *proper* review of my wife's complaints by the U.S. Department of Agriculture. Perhaps you might also, at your discretion, request an investigation of possible civil rights violations by the U. S. Attorney's Office.

Sincerely,

/s/ Darryl R. Kemp
Darryl R. Kemp

Attachment: Letter from the Office of Senator William L. Armstrong, dated December 13, 1984

ENC: CSU Discrimination Complaint

Betty Wilson, Plaintiff vs. Adams County Board of County Commissioners and Al Lesser, Defendants

Summary of a telephone call (conversation) between Sandra R. Kemp, CSU Extension Agent and Betty Geringer, Leonard Pruett's former secretary

---

Supreme Court, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLE

(2)

No. 90-1584

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SANDRA R. KEMP,

Petitioner,

vs.

STATE BOARD OF AGRICULTURE, AND COLORADO STATE UNIVERSITY; ROSELYN KELLER, IN HER CAPACITY AS A CONCILIATION OFFICER AT COLORADO STATE UNIVERSITY; DANA HIATT, IN HER CAPACITY AS DIRECTOR OF OFFICE OF EQUAL OPPORTUNITY AT COLORADO STATE UNIVERSITY; AND PHILLIP AUSTIN, IN HIS CAPACITY AS PRESIDENT OF COLORADO STATE UNIVERSITY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

***Daniel R. Satriana, Jr.**
Marlene T. Gresh
HALL & EVANS
1200 17th Street, Suite 1700
Denver, Colorado 80202
303/628-3300
Counsel for Respondents

*Counsel of Record

QUESTION PRESENTED

1. Whether the Colorado Supreme Court's analysis of the Petitioner's claim of retaliation for the exercise of her right of freedom of speech was in accordance with the applicable decisions of this Court.

2. Whether the Colorado Supreme Court's application of the balancing test to Petitioner's claim under the petition clause of the First Amendment is consistent with applicable decisions of this Court, and the federal courts of appeals.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE CASE	1
A. FACTUAL BACKGROUND	1
B. PROCEEDINGS BELOW	3
II. REASONS FOR NOT GRANTING THE PETITION	4
A. The Respondents are an agency of the State of Colorado and State employees sued in their official capacities only and are thus not persons subject to suit under 42 U.S.C. §1983	4
B. The Petition for Certiorari should be denied since the Colorado Supreme Court's analysis of the Petitioner's claim of retaliation for the exercise of her right of freedom of speech was in accordance with the applicable decisions of this Court	5
C. The Colorado Supreme Court's application of the balancing test to Petitioner's claim under the petition clause of the First Amendment is consistent with applicable decisions of this Court, and the federal courts of appeals	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES
CASES

	PAGE
Belk v. Town of Minocqua 858 F.2d 1258 (7th Cir. 1988)	8, 9
Connick v. Myers, 461 U.S. 138, 148 (1983)	6
Gray v. Lacke 885 F.2d 399, 413 (7th Cir. 1989)	9
McDonald v. Smith 472 U.S. 479 (1985)	7-9
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	6
Phares v. Gustafsson 856 F.2d 1003, 1009 (7th Cir. 1988)	9
Pickering v. Board of Education, 391 U.S. 563 (1968)	6
Thorne v. Bailey, 846 F.2d 241, 244 (4th Cir. 1988)	9
White v. Nicholls 3 How. 266, 11 LEd. 591 (1845)	8
Will v. Michigan Department of State Police, 491 U.S. 58 (1989)	4, 5

OTHERS

42 U.S.C. §1983	4, 5

I. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The critical facts of this case are undisputed. Petitioner, Sandra Kemp, was employed with Colorado State University ("CSU" or the "University") as an extension agent from August 16, 1982 to August 30, 1985. This case arose out of a discrimination complaint filed by Petitioner with the Equal Opportunity Office of CSU ("University EEO") pursuant to the University Grievance Procedure for the Resolution of Complaints of Discrimination ("Grievance Procedure"). Petitioner alleged in her discrimination complaint, *inter alia* that she was a victim of on-the-job racial discrimination by two white males.

Under the Grievance Procedure, an employee who files a complaint of discrimination may choose to proceed either formally or informally, and the hearing may be either open or closed. If the complainant chooses to proceed informally, he or she may simultaneously pursue remedies in other outside agencies and courts. If the complainant chooses to proceed formally, he or she must allow the internal University procedure to proceed to conclusion before seeking outside assistance.

Petitioner selected a formal, closed hearing. Petitioner read a copy of the Grievance Procedure and understood the distinction between informal and formal complaints prior to making that selection. Petitioner did not seek any assistance from the University EEO office prior to choosing a formal, closed hearing. Petitioner admitted that she considered the Grievance Procedure to be binding upon both parties.

Prior to Petitioner's closed hearing, Petitioner violated the closed nature of the hearing by sending a "routing slip" to the office of Senator William L. Armstrong, asking to "have the Senator's office to monitor my complaint [sic]." On or about January 25, 1985, the formal, closed hearing was held. After the hearing was completed, but prior to the hearing

panel rendering its decision, Petitioner's husband contacted the office of Senator William L. Armstrong to complain of what he perceived to be "too many irregularities practiced by the EEO office to prejudice the case in the Defendants' favor."[1] The letter requested that the office of Senator Armstrong assist Petitioner in obtaining a "proper" review of Petitioner's complaints by the Department of Labor and assist Petitioner "in maintaining her employment at CSU." Petitioner admitted that, although the letter was signed by her husband, she considered it to be her letter as well.

Joann Gelvin of Senator Armstrong's office contacted CSU concerning Mr. Kemp's complaints and asked for information regarding Petitioners discrimination complaint. It was through Joann Gelvin that Respondent learned of the earlier contact with Senator Armstrong's office via the routing slip. On or about February 13, 1985, Petitioner was informed by Respondent Roselyn J. Keller, Conciliation Officer, that Petitioner's contacts with Senator Armstrong's office breached the formal, closed nature of the hearing to which the

---

[1] The "irregularities" referred to in the letter to Senator Armstrong are as follows: (1) that Mr. Lesser was acting in the capacity as both a representative and a witness; (2) that her supervisor, Mr. Lesser, was also the Defendants' supervisor; (3) that she had been told she could not have an attorney present during the hearing; (4) that each of the respondents had their own representatives, so since there were two respondents, there were two representatives for the respondents; (5) that Ms. Keller issued an informal decision by suggesting to Plaintiff's representative that she might consider resignation before Plaintiff's case was voided. (Plaintiffs Deposition at 88, 93, 95, and 99) Plaintiff's husband, Darryl Kemp, alleges that the following additional irregularities occurred: (6) the Director of Extension, Chadwick, "absented" himself from the case claiming neutrality; (7) Mr. Kemp was required to testify and then leave the proceedings; (8) Mr. Kemp was told that he could not be a representative because he was not from the "CSU community"; (9) in the event that Plaintiff would receive a favorable verdict, that the perpetrators would not be punished, and she would not receive what she had requested in her Complaint; (10) Plaintiff was told the hearing would last three days, and in fact, it only lasted one and one-half days. (Darryl Kemp Deposition at 52-54)

parties agreed, and therefore, the Grievance Procedure was "voided." Petitioner was informed by Respondent Keller that although the internal Grievance Procedure was terminated, she was free to pursue her discrimination complaint in other agencies and in the courts.

B. PROCEEDINGS BELOW

Petitioner brought the instant action against Colorado State University, Roselyn Keller in her official capacity as CSU's Conciliation Officer, Dana Hiatt in her official capacity as CSU's Director of Office of Equal Opportunity and Philip Austin in his official capacity as CSU's President. Petitioner filed her complaint in the District Court for the County of Larimer, State of Colorado on or about October 6, 1986, alleging claims of violation of her rights of free speech and to petition the government for redress of grievances under the United States Constitution and the Colorado Constitution. After discovery, Respondents moved for summary judgment on each of Petitioner's claims. The District Court for the County of Larimer granted summary judgment in favor of Respondents ruling that Petitioner's speech was not on a matter of public concern and that in any event, CSU's interest in maintaining the integrity of its grievance procedure outweighed the interest of Petitioner. The District Court also ruled that Petitioner's conduct was not protected by the petition clause.

The Petitioner appealed to the Colorado Court of Appeals which affirmed the judgment of the District Court. While the appeal was pending before the Colorado Court of Appeals, this Court announced its decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) holding that states, their agencies and employees while acting in their official capacities were not persons subject to suit under 42 U.S.C. §1983. The Colorado Court of Appeals ordered the parties to submit supplemental briefs on the question of whether Colorado State University is an agency of the State of

Colorado. The Court of Appeals ruled on the merits of Petitioner's appeal and stated that "[s]ince we have determined that plaintiff's claims were properly dismissed for lack of substantive merit, we need not address the impact of *Will* upon this case."

Petitioner then petitioned the Colorado Supreme Court for writ of certiorari. The writ was granted and after briefing and oral argument, the Colorado Supreme Court affirmed the Court of Appeals. Although the issue was raised before the Colorado Supreme Court, the Supreme Court likewise did not address whether CSU is an agency of the State of Colorado and thus not subject to suit under 42 U.S.C. §1983.

II. REASONS FOR NOT GRANTING THE PETITION

A. The Respondents are an agency of the State of Colorado and State employees sued in their official capacities only and are thus not persons subject to suit under 42 U.S.C. §1983

Petitioner does not dispute that her claims are against the University itself and University employees sued only in their official capacities. As stated above, neither the Colorado Court of Appeals nor the Colorado Supreme Court have ruled upon whether Colorado State University is an agency of the state of Colorado and thus not subject to suit under this Court's decision of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

Absent a determination that the Respondents are persons subject to suit under 42 U.S.C. §1983, the issues raised in Petitioner's Petition for Writ of Certiorari are only *potential* federal claims rather than actual federal claims. Thus, this Court should decline to review the decision of the Colorado Supreme Court on certiorari.

B. The Petition for Certiorari should be denied since the Colorado Supreme Court's analysis of the Petitioner's claim of retaliation for the exercise of her right of freedom of speech was in accordance with the applicable decisions of this Court.

Assuming that federal claims exist, the Colorado Supreme Court engaged in the correct analysis in evaluating Petitioner's claims of violation of the rights of free speech and to petition. The analysis to be utilized to evaluate such claims is well settled. Beginning with the case of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), this Court has applied a three-step process by which a public employee's claim of retaliation for exercising a first amendment right is to be evaluated. Initially, the plaintiff must show that her speech touched upon a matter of public concern. If the court concludes that the speech is a matter of public concern, then the court must perform a balancing test to determine if the interest of the employee, as a citizen, in commenting upon the subject at issue outweighs the interest of the government, as the employer in promoting an efficient work environment. (*Connick v. Myers*, 461 U.S. 138, 148 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968)) If the balance weighs in favor of the government, the analysis then ends. If the balance weighs in favor of the plaintiff, then the plaintiff must demonstrate that the speech was a substantial or a motivating factor behind the adverse employment decision. Only after those two factors are established by the plaintiff does the burden shift to the defendant. In order to defeat the plaintiff's claim, a defendant must show by a preponderance of the evidence that, absent the protected activity, plaintiff would have suffered the same adverse decision. (*Mt. Healthy, supra* at 287)

The Colorado Supreme Court engaged in that precise analysis in the instant case. The Supreme Court examined the speech in question and determined that it touched upon a matter of public concern. The Colorado Supreme Court then weighed the interests of the Petitioner against the interests of

CSU in maintaining the integrity of its grievance process. The Colorado Supreme Court determined that the primary interest that Petitioner sought to promote was her personal dispute against the University and not to alert the public to a wider problem at the University. The court weighed the Petitioner's self-serving interest against the University's interest in having a grievance policy that was followed by all the parties. After the weighing process, the Colorado Supreme Court determined that the balance weighed in favor of the University. Although Respondents disagree with the conclusion of the Colorado Supreme Court that Petitioner's speech touched upon a matter of public concern, clearly, the Colorado Supreme Court was correct in its ultimate conclusion that Petitioner's interest was outweighed by the University's interest.

The Colorado Supreme Court engaged in an analysis of Petitioner's claims consistent with the decisions of this Court, thus this Court should deny the Petition for Writ of Certiorari.

C. The Colorado Supreme Court's application of the balancing test to Petitioner's claim under the petition clause of the First Amendment is consistent with applicable decisions of this Court, and the federal courts of appeals.

This Court has stated that "the right to petition is cut from the same cloth as the other guarantees of the [First] Amendment, and is an assurance of a particular freedom of expression." (*McDonald v. Smith* 472 U.S. 479 (1985)) In evaluating petition claims, this Court has specifically rejected the notion that the Petition Clause protects speech regardless of the content of the petition. (*See McDonald, supra*; *White v. Nicolls* 3 How. 266, 11 LEd. 591 (1845)) This Court in *McDonald* stated:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special first

> amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. *See Mine Workers v. Illinois Bar Association* 389 U.S. 217, 222 (1967). These first amendment rights are inseparable, *Thomas v. Collins* 323 U.S. 516, 530 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other first amendment expressions.

(*McDonald, supra* at 484-85)

The United States Courts of Appeals have refused to grant heightened protection for speech clothed as a petition for redress. For example, the Seventh Circuit stated in *Belk v. Town of Minocqua* 858 F.2d 1258 (7th Cir. 1988):

> Notwithstanding the central importance *Connick* attaches to the content of a public employee's speech, Belk asks us to accord absolute first amendment protection, without regard to content, to any grievance a public employee files or threatens to file. Not only is there no legal or historical precedent for such a stratification of first amendment freedoms, as *McDonald* suggests, but such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form. Accordingly, we decline to hold as a matter of law that the fact that the Town Board may have terminated Belk in retaliation for threatening to file a grievance constitutes a *per se* violation of the first amendment.

(*Belk, supra* at 1262; *See also Thorn v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) ("Since it is plainly contrary to *McDonald* we reject [plaintiffs] argument that the Petition Clause enjoys a 'preferred place' among first amendment freedoms.");

Gray v. Lacke 885 F.2d 399, 413 (7th Cir. 1989) ("[I]n deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern by looking at the content, form, and context of the petition."); *Phares v. Gustafsson* 856 F.2d 1003, 1009 (7th Cir. 1988) ("Thus, we will analyze an alleged violation of the petition clause in the same manner as any other alleged violation of the right to engage in free speech."))

Thus, consistent with this Court and the various federal courts of appeals, the Colorado Supreme Court concluded that although her petition tangentially related to a matter of public concern, in the balance, the Petitioner's interest in "petitioning" Senator Armstrong in regard to her private personnel dispute was outweighed by the University's interest in maintaining the integrity of its grievance procedure. Precluding a court from engaging in such a balancing of interests would result in elevating the right to petition above all other rights protected by the First Amendment. Consequently, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

* DANIEL R. SATRIANA, JR.
MARLENE T. GRESH
of HALL & EVANS
1200 17th Street, Suite 1700
Denver, Colorado 80202
303/628-3300
Counsel for Respondents-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1991, three true and correct copies of the above and foregoing **BRIEF OF RESONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT** was deposited in the United States Mail, postage prepaid, addressed to:

A. Bruce Jones, Esq.
HOLLAND & HART
Post Office Box 8749
Denver, Colorado 80201

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this ___ day of May, 1991 by _____. Witness my hand and official seal.

My commission expires: _____

[S E A L]

_____
Notary Public